Nos. 241-242

Office - Supreme Court, U.
JUL 18 1945
ELMORE GROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

IN THE MATTER
of
ASSOCIATED GAS AND ELECTRIC COMPANY,
Debtor.

IN THE MATTER
of
ASSOCIATED GAS AND ELECTRIC CORPORATION,
Debtor.

In Proceedings for the Reorganization of a Corporation pursuant to Chapter X of the Bankruptcy Act

IRVING ELIAS, MAX MENACHEN and MICHAEL MOISE, constituting the Protective Committee for the Holders of Convertible Obligations, Due 2002, etc., *et al.*,
Petitioners,

vs.

STANLEY CLARKE, Trustee of ASSOCIATED GAS AND ELECTRIC COMPANY, Debtor, *et al.*,
Respondents,

and

DENIS J. DRISCOLL and WILLARD L. THORP, Trustees of ASSOCIATED GAS AND ELECTRIC CORPORATION, Debtor, *et al.*,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PAUL DURYEA MILLER,
20 Pine Street,
New York 5, N. Y.,

ABRAHAM MITNOVETZ,
29 Broadway,
New York 5, N. Y.,
Attorneys for Petitioners.

MUDGE, STERN, WILLIAMS & TUCKER,
20 Pine Street,
New York 5, N. Y.,
Of Counsel.

INDEX.

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	3
STATEMENT	3
SPECIFICATION OF ERRORS TO BE URGED	14
REASONS FOR GRANTING THE WRIT	14
I. The Decision of the Circuit Court of Appeals is Plainly wrong and, if Permitted to Stand, will Perpetuate a Grave Injustice to Many Holders of Ageco Securities	14
A. The right of COABs, received in exchange for CDCs, to participate in the Plan on a parity with CDCs and CICs is not founded upon a claim for rescission but upon the express terms of the COABs which place them on a parity with the CDCs and the CICs	15
B. The purported conversion of unsubordinated CDCs into subordinated COABs was wholly void for lack of consideration, and accordingly the subordination clause in the COABs is unenforceable, whether in the hands of an original holder or a transferee	17
C. As to holders of COABs which were received in exchange for one issue of CDCs (the 1931 Series), there is no possible basis for distinguishing between Original and Non-original holders, since admittedly the CDCs 1931 Series were not, and could not have been, validly converted	19
II. The decision of the Circuit Court of Appeals is in Conflict with, and does not give Proper Effect to, Applicable Decisions of this Court	20

CITATIONS.

PAGE

Cases:

Arend v. *Smith*, 151 N. Y. 502 (1897) 18

Boese v. *King*, 108 U. S. 379 (1883) 21

Brainard v. *Commissioner of Internal Revenue*, 91 F. (2d) 880 (C. C. A. 7th, 1937) 18

Elias v. *Clarke*, 143 F. (2d) 640 (C. C. A. 2d, 1944), c.d. 323 U. S. 778 10

Globe Bank v. *Martin*, 236 U. S. 288 (1915) 23

In re Moore, 11 F. (2d) 62, (C. C. A. 4th, 1926) 21

Moore v. *Bay*, 284 U. S. 4 (1931) 23

Prudence Corp. v. *Geist*, 316 U. S. 89 (1942) 15, 23, 24

Sampsell v. *Imperial Paper Corp.*, 313 U. S. 215 (1941) 21

Young v. *Higbee Co.*, 324 U. S. 204 (1945) 21

Statutes:

BANKRUPTCY ACT

Section 65(a) (11 U. S. C. A. 105(a)) 20

Chapter X (11 U. S. C. A. §§501-676) 2, 3

Miscellanous:

Remington on Bankruptcy (4th Ed.), Section 896.... 24

Williston on Contracts (Rev. Ed.), Section 447a.... 24

Abbreviations.

Ageco:	Associated Gas and Electric Company, Debtor, or its Trustee
Agecorp:	Associated Gas and Electric Corporation, Debtor, or its Trustees
CDCs:	Ageco Convertible Debenture Certificates, without fixed maturities
CICs:	Ageco 5½% Convertible Investment Certificates, due November 15, 1938, most of which were extended to 1943
COABs:	Ageco Convertible Obligations, Series A and B, due 2002
Original COABs:	Holders of COABs who obtained such securities from Ageco in exchange for CDCs and still retain said securities
Non-original COABs:	All COABs other than Original COABs
CCs:	Ageco Convertible Certificates without fixed maturities
Old COs:	Ageco Convertible Obligations without fixed maturities
FIDs:	Ageco Fixed Interest Debentures, including Ageco Convertible Investment Certificates
73s:	Agecorp Convertible Debentures due 1973
78s:	Agecorp Income Debentures due 1978

IN THE

Supreme Court of the United States

Nos. —OCTOBER TERM, 1945.

IN THE MATTER
of
ASSOCIATED GAS AND ELECTRIC COMPANY, Debtor.

IN THE MATTER
of
ASSOCIATED GAS AND ELECTRIC CORPORATION, Debtor.

In Proceedings for the Reorganization of a corporation pursuant to Chapter X of the Bankruptcy Act.

IRVING ELIAS, MAX MENACHEN and MICHAEL MOISE, constituting the Protective Committee for the Holders of Convertible Obligations, Due 2002, etc., *et al.*,

Petitioners,

vs.

STANLEY CLARKE, Trustee of ASSOCIATED GAS AND ELECTRIC COMPANY, Debtor, *et al.*,

Respondents,

and

DENIS J. DRISCOLL and WILLARD L. THORP, Trustees of Associated Gas and Electric Corporation, Debtor, *et al.*,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The above named petitioners respectfully pray that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Second Circuit entered April 19, 1945 (R. 3493-3594), affirming

orders (R. 148-152) of the United States District Court for the Southern District of New York approving, in proceedings under Chapter X of the Bankruptcy Act, a joint Plan of Reorganization (herein called the Plan) of Associated Gas and Electric Company (Ageco),[1] Debtor, and of Associated Gas and Electric Corporation (Agecorp), and approving a compromise (herein called the Recap Compromise) of controversies between said Debtors and among various of their security holders.

Petitioners are a Committee for "non-original" holders of Ageco Convertible Obligations due 2002, Series A and B (COABs), i. e., for all holders of Ageco COABs except original holders of COABs who received them in exchange for Ageco Convertible Debenture Certificates (CDCs) *and who still hold them;* and the sole issue here involves the validity of the exclusion of such "non-original" holders of COABs from participation in the Plan.

Opinions Below.

Neither the opinion of the District Court (R. 152-297), nor that of the Circuit Court of Appeals (R. 3590-3592) is yet reported.

Jurisdiction.

The judgments of the Circuit Court of Appeals were entered April 19, 1945 (R. 3593-3594). Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statutes Involved.

The issues involve Chapter X of the Bankruptcy Act, and particularly Section 65(a) thereof, which provides that (11 U. S. C. A. 105(a)):

---

[1] A list of abbreviations used herein appears at the end of the Index, p. iii, *supra.*

"Dividends of an equal per centum shall be declared and paid on all allowed claims except such as have priority or are secured."

They also involve the due process clause of the Fifth Amendment.

Questions Presented.

The Plan of Reorganization, which adopts the Recap Compromise, provides for participation, *inter alia,* of holders of Ageco Convertible Debenture Certificates (CDCs) and Ageco Convertible Investment Certificates of 1938 (CICs). It excludes from participation holders of Ageco Convertible Obligations due 2002 (COABs), except as to COABs which were originally exchanged for CDCs and are still in the hands of the *original holders.*

The principal questions presented are:

(1) Whether the Plan is fair and equitable insofar as it provides for participation of CDCs and CICs, as general creditors of Ageco, but excludes participation of all COABs whose claims are on a parity with, and by their terms are not subordinate to, the CDCs and the CICs.

(2) Whether, in a plan of reorganization under Chapter X of the Bankruptcy Act, it is fair and equitable, and not in contravention of the due process clause of the Fifth Amendment, to deny to *transferees* of certain securities of the Debtor the recognition which is accorded to *original holders* of the same class of securities.

Statement.

On January 10, 1940, Ageco and its subsidiary, Agecorp, both public-utility holding companies, filed separate petitions in the District Court for reorganization under Chapter X of the Bankruptcy Act (R. 61, 278, 3563-3566). Ageco is the top holding company, owning all the stock of Agecorp which in turn owns stock and securities of other holding companies (R. 62).

Agecorp has assets valued at from $105,000,000 to $115,000,000 (R. 296). It has outstanding liabilities in the aggregate principal amount of $189,421,095, made up as follows (R. 61, 279):

8% Bonds due 1940	$ 7,438,510
Convertible Fixed Interest Debentures due 1973 (73s)	24,221,465[2]
Income Debentures due 1978 (78s)	133,539,655

Ageco has no assets except stock and notes of Agecorp, such notes being subordinate to all other Agecorp Indebtedness (R. 62). The outstanding claims against Ageco aggregate $121,182,495.52 in principal amount, made up as follows (R. 62-63, 260, 279, 289-293):

Fixed Interest Debentures (FIDs), including Convertible Investment Certificates (CICs)[3]		$ 58,994,830.69
Income Debentures, due 1983		12,000.00
Sinking Fund Income Debentures, due 1983		1,217,630.00
Sinking Fund Income Debentures, due 1986		6,918,410.00
Convertible Debenture Certificates (CDCs)		3,808,477.00
Convertible Obligations, due 2002 (COABs)		
Original COABs (Est.)	20,000,000	
Non-original COABs	22,089,844	42,089,844.00
Scrip matured or maturing after January 10, 1940		10,199,780.83
Original holders of Preferred and Preference Stocks (treated as CDCs in Plan)		1,750,000.00
Total		$121,182,495.52

[2] By their terms the Agecorp 73s are convertible into twice their face amount of 78s (R. 279).

[3] These include the Ageco CICs of 1938, many of which were extended to 1943 (R. 289).

About a year after the filing of the petitions in bankruptcy, the two estates became involved in extensive litigation, know as the "Recap Litigation" and the "CDC Litigation". The Recap Litigation began in February, 1941, when the Ageco Trustee filed a petition in the Agecorp proceeding seeking adjudication of his interest in and to the assets held by the Agecorp Trustees, as well as the right of some or all of the *unsubordinated* security holders of Ageco to share in the Agecorp assets on a parity, or better, with some or all of the Agecorp creditors. Answers to this petition, and to similar petitions on behalf of Ageco creditors, were filed by the Agecorp Trustee and others (R. 63-64, 281, 2401-2451). On July 27, 1941, the issues raised by said petition and answers[4] were referred to a Special Master (R. 63-64).

The CDC Litigation arose in the Ageco proceeding as the result of proofs of claim which were filed on behalf of various classes of Ageco creditors, including—

(1) holders of CDCs still outstanding,

(2) holders of COABs who originally obtained them in exchange for CDCs (such COABs being herein called Original COABs), and

---

[4] Among the numerous issues which the Circuit Court of Appeals found to be "reasonably disputable" (R. 3579-3586) were—

(1) whether the transactions upon which Ageco's investment in Agecorp was changed from unsubordinated indebtedness into subordinated indebtedness or stock are void, and now voidable by the Ageco Trustee;

(2) whether the recapitalization pursuant to which the Agecorp 73s and 78s were issued was ineffective to give the holders of such securities priority over the holders of the Ageco FIDs and other unsubordinated creditors of Ageco; and

(3) whether the separate corporate entities of Ageco and Agecorp should be ignored and the two corporations treated as one.

(3) holders of COABs other than those who originally exchanged them for CDCs (such COABs being herein called Non-original COABs).[5]

These proofs of claim sought adjudication that the claimants were unsubordinated creditors of Ageco, or *on a parity* with unsubordinated creditors, and as such, were entitled to share in the Ageco assets with other unsubordinated Ageco creditors (Elias R. 3-10).[6] Objections to these claims were filed by the Ageco Trustee and others (Elias R. 11-85). On October 27, 1942, the District Court referred these claims to the same Special Master (R. 64-65; Elias R. 86-97).

The COABs are in most respects similar to CDCs save that by their terms they are subordinate to all Ageco indebtedness "except * * * obligations convertible at the option of the Company into stock of the Company of any class * * *" (Elias R. 171). The COABs (aggregating $42,089,844 in principal amount; Elias R 108) came into being as a part of the corporate and financial machinations of Howard C. Hopson, who was the dominant personality controlling both Ageco and Agecorp (R. 3574) and who for many years transferred and manipulated the assets of the Associated Gas system to suit his immediate purposes without regard to the rights of the security holders (R. 3574-3581). Most of the COABs came into being as follows: In May, 1932, Ageco had outstanding $36,333,539

---

[5] Many of the Non-original COABs were originally received in exchange for CDCs and thereafter transferred by the original holders thereof. Some of them were issued by Ageco for cash and some in exchange for Ageco securities other than CDCs (Elias R. 251, 255).

[6] By stipulation dated June 18, 1945, filed with the Clerk of this Court, the record in Nos. 590 and 591, October Term, 1944, herein referred to as the Elias record, is part of the record on appeal in the present cases. The Elias record is herein referred to as "(Elias R.)".

of CDCs, $970,200 of CCs, and $12,042,900 of Old COs (Elias R. 235). The CDCs were *unsubordinated general claims against Ageco, but they were convertible by Ageco into Preferred Stock* (Elias R. 231, 233, 235).[7] They were thus on a parity with the FIDs, save that the FIDs (except the CICs of 1938) were not convertible by Ageco into Preferred Stock. In a desire to reduce, or at least subordinate, the large debt represented by the CDCs, CCs and Old COs, Ageco in May, 1932, mailed letters to holders of CDCs, CCs and Old COs, notifying them that pursuant to the terms of said securities the Company had converted them into Preferred Stock on the basis of one share of Preferred Stock for each $100 principal amount of claim, *but offering said holders the privilege of exchanging them for COABs* (Elias R. 241-244). In June, 1933 (Elias R. 247-248), and again in the fall of 1934 (Elias R. 248-250), Ageco mailed similar letters to all known holders of CDCs, CCs and Old COs who had not then surrendered the same in exchange for Preferred Stock or COABs. As the result of representations made in said letters, most of the holders of CDCs, CCs and Old COs accepted the optional exchange offer and surrendered them for COABs (Elias R. 251). As of January 10, 1940, the date of bankruptcy, $3,808,527 of CDCs had not been surrendered (Elias R. 111-112); and "many" of the COABs which were issued to those exercising the said option were sold or transferred by their original holders (Elias R. 255).

The basic contentions made in the CDC Litigation by holders of CDCs and by both original and non-original holders of COABs, was that Ageco's option or conversion privilege in the CDCs was invalid or, even if valid, had

[7] The CCs and Old COs were subordinated general claims, without maturity date, against Ageco and were convertible by Ageco into Preferred Stock (Elias R. 231, 233, 235).

been illegally or improperly exercised.[8] Rejecting, in major part, these contentions, the Special Master in his Report of March 30, 1943, in the CDC Litigation (R. 64-65; Elias R. 196-263) found, *inter alia*,—

> (a) that the conversion option in the CDCs was valid, and had been validly exercised by Ageco except as to the CDCs—1931 Series (Elias R. 262);
>
> (b) that Ageco did not legally convert the CDCs—1931 Series (Elias R. 262), and that holders thereof are unsubordinated general creditors of Ageco (Elias R. 263);
>
> (c) that "Persons who do not hold COAB's or stock, issued to such persons in exchange for CDC's, CC's or old CO's, have no right of rescission of such exchange, *whether or not* their transferor or any other person may have had such rights" (Elias R. 262)[9]; and
>
> (d) that the COABs are subordinate to all Ageco indebtedness "except obligations convertible at Ageco's option into stock" (Elias R. 262-263); and in this latter connection, the Master found specifically *that the COABs by their terms are not subordinate to CDCs* (Elias R. 226).

It will be noted that although the Special Master discussed (Elias R. 224-225), he did not *directly pass on*, the question whether the original holders of COABs, who received them in exchange for CDCs, had a right of rescission because of misrepresentations in the letters inviting the exchange (in effect, he ruled that they did *not* have any such right because he ruled that the conversion option had been validly exercised, save as to the CDCs 1931 Series); he merely ruled (Elias R. 262) that *transferees* of such holders had no such right.

---

[8] Said contentions are not material to this petition.

[9] All italics in quotations herein are supplied unless the contrary is indicated.

Shortly after the Special Master issued his Report the Ageco Trustee and the Agecorp Trustees formulated the Plan of Reorganization, dated June 14, 1943, giving effect to the Recap Compromise (Elias R. 280). The Recap Compromise was a proposal which had been filed by the Ageco and Agecorp Trustees in November, 1942, to compromise the Recap Litigation and certain phases of the CDC Litigation (R. 65). It was, in essence, the basis of a plan of reorganization under which the conflicting issues were settled by the establishment of a basis upon which the various *unsubordinated* Ageco and Agecorp creditors would share in the assets of Agecorp. The Plan, which adopted the Recap Compromise, provided for participation by all the *unsubordinated* Ageco claims, including the CICs and the CDCs—all of which are convertible by Ageco into stock, and hence on a parity with *all* COABs—, and the Original COABs (R. 127). *It did not provide for any participation by the Non-original COABs* (R. 129).

Thereafter, upon the filing of objections to the Special Master's Report (Elias R. 264-267), the Ageco Trustee requested the District Court to pass, at that time, only upon those portions of the Report which dealt with the status of Non-original COABs (R. 4). Complying with this request the District Court, in its opinion of July 30, 1943 (Elias R. 271-288) did not rule on the issues involved in the claims of the CDCs and the Original COABs but dealt only with the claims of the Non-original COABs. It did not *pass on* the question whether the original holders of COABs, who received them in exchange for CDCs, had a right of rescission because of fraud or misrepresentations but, on the *assumption that they did have such a right* (contrary to the express holding of the Special Master), held that, under New York law, such right did not pass to any *transferee* of such original holder in the absence of a

specific assignment thereof (Elias R. 281-282). In other words, the District Court held that persons who acquired COABs (which had originally been issued in exchange for CDCs) by transfer from a prior holder thereof could not take advantage of the *assumed* invalidity of the exchange of CDCs, whether or not the transferor had been a party to a CDC exchange (Elias R. 283-284).

On August 13, 1943, pursuant to said opinion, the District Court entered an order adjudging that holders of COABs, except persons to whom COABs were *originally issued in exchange for CDCs,* are subordinate to "general creditors of Ageco, except holders of obligations convertible at Ageco's option into stock"; and reserving jurisdiction to pass upon the remainder of the Special Master's Report, i.e., those portions of the Report dealing with the claims of CDCs, Original COABs, and other types of claims recognized in the Plan (Elias R. 298-302; 53 F. Supp. 107).

It will be noted that—although the District Court did not purport to pass on the claims of the original COABs—this order resulted, nominally at least,[10] in the classification of Original COABs as *unsubordinate* Ageco debt and of Non-original COABs as *subordinate* Ageco debt, all on the basis of an assumption (contrary to the ruling of the Special Master) that original holders of COABs, who received them in exchange for CDCs, had a right of rescission which did not pass to transferees.

Upon appeal (although the record on appeal did not include matters bearing on the validity of the exchange of CDCs for COABs, since the District Court had *assumed* that the original holders of COABs had a right of rescission), the Circuit Court of Appeals rejected the Dis-

---

[10] If the order is read literally the COABs are not, for example, made subordinate to CDCs (which participate in the Plan) since CDCs are "convertible at Ageco's option into stock" (Elias R. 226).

trict Court's assumption that the conversion option was invalid as being "rather violent" and "thoroughly opposed to the realities" (143 F. (2d) 640, 644), and held, in conformity with the Special Master, that the option contained in the CDCs was valid, that the conversion offer was made by Ageco in good faith and was not fraudulent, and that the subordination clause in the COABs was valid. On this basis the Circuit Court of Appeals affirmed the order of the District Court (Elias R. 324-337). It should be noted, however, that the rationale of the Circuit Court of Appeals *applied equally to Original COABs (and, indeed, to all the CDCs, since Ageco purported to convert all CDCs into Preferred Stock) as well as to Non-original COABs, and thus completely negatived all basis for an order classifying Original COABs and CDCs as unsubordinate creditors of Ageco and Non-original COABs as subordinate creditors!*

Thereafter, these petitioners filed a petition for certiorari which was denied on November 20, 1944 (323 U. S. 778).[11]

On September 3, 1943, the Special Master in a Report on the Recap Compromise (R. 6-101), in effect retracted his earlier ruling in his Report of March 30, 1943 in the CDC Litigation (to the effect that the conversion option in the CDCs was valid, and, except as to the CDCs 1931 Series, had been validly exercised by Ageco; Elias R. 262-263), and ruled that *"Doubt exists"* as to "Whether Ageco's option to convert the CDCs into stock was a valid

[11] Said petition unfortunately failed to point out the fatal inconsistency in the rationale of the Circuit Court of Appeals, which completely nullified the classification order in so far as it distinguished between Original COABs and CDCs on the one hand and Non-original COABs on the other.

Moreover, as shown later herein, the basis of the decision of the Circuit Court of Appeals in that case, so far as petitioners are concerned, was almost diametrically opposed to the basis of the decision involved in the present petition.

provision" and "Whether the option was validly exercised" (R. 100). In other words, having, in his Report of March 30, 1943, eliminated the Non-original COABs (which were received in exchange for CDCs) as unsubordinate Ageco debt on the ground that the conversion option was legal and validly exercised (Elias R. 262-263), *in his Report of September 3, 1943, on the Recap Compromise (R. 100), the Special Master justifies the treatment of the Original COABs and the CDCs on the ground that "Doubt exists" as to said points!*

On April 19, 1944, the Ageco and Agecorp Trustees filed in both proceedings a petition for approval of the Plan (R. 5), which had theretofore been approved by the Securities and Exchange Commission (R. 5, 282-283). Thereafter, on August 25, 1944, the District Court handed down its opinion (R. 152-277), together with findings of fact and conclusions of law (R. 277-314), approving the Plan and the Recap Compromise, and on September 12, 1945, entered orders to that effect (R. 148-152).

In its said opinion of August 25, 1944, the District Court rejected the Special Master's Conclusion that "Doubt exists" as to the validity of the option and its exercise, and held that "the opinion of the Circuit Court that the Ageco option to convert the CDCs into stock was a valid and enforceable provision of the Certificate, must * * * be accepted as controlling" (R. 262); but it further found that there was a sufficient probability that the CDCs might establish the invalidity of Ageco's *exercise of the option,* (*i.e.,* to convert the CDCs into stock) to justify some participation for CDCs under the compromise, and that since COABs, in the hands of the *original holders,* "claimed derivatively as it were, through the CDCs, a basis for their participation is also afforded" (R. 264).

This decision, so far as the COABs are concerned, *piled confusion on confusion!* If Ageco had invalidly exercised

the option to convert the CDCs into stock and then into COABs, the COABs *would never have come into existence at all as obligations of Ageco;* and, in legal effect, *all* holders thereof would still be holders of CDCs. In other words, an invalid exercise of the CDC conversion option *would affect the COABs not only in the hands of the original holders but in the hands of transferees as well.* It is thus apparent that the District Court, in justifying the classification of Original COABs as unsubordinate debt, *adopted the very contention which it had rejected when advanced in the CDC Litigation on behalf of the Non-original COABs to support their claim to a like classification.*

Upon appeal from the orders approving the Plan and the Recap Compromise, the Circuit Court of Appeals, apparently quite unknowingly, completely reversed its earlier position in the CDC Litigation with respect to the COABs —to the effect that CDC conversion option was valid and had been validly exercised (Elias R. 324-337; 143 F. (2d) 640, at pp. 644-646),—and justified the separate classification of Original COABs and Non-original COABs on the ground (R. 3588) that the original holders had "received their bonds in exchange for CDCs, and are granted participation in the assets on the theory that they may have a claim for rescission or damages based on fraud or misrepresentation in connection with the exchange". This was the theory which the District Court had adopted, on the basis of an "assumption" that original holders of COABs had a right of rescission, in the CDC Litigation (Elias R. 281-284), and which the Circuit Court of Appeals, on the earlier appeal in that Litigation had rejected as "rather violent" and as "thoroughly opposed to the realities"! (143 F. (2d) at pp. 644-646).

In the light of the foregoing facts we think it fair to state that, whether because of the unusual number and com-

plexity of the other issues involved or otherwise, the rights of these petitioners (representing holders of at least $28,089,884 of Non-original COABs) have not received full and fair attention at the hands of the courts below.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

(1) In holding that the CDCs, CICs and Original COABs may participate in the Plan notwithstanding the exclusion of Non-original COABs.

(2) In failing to hold that the Plan violates Chapter X of the Bankruptcy Act, and deprives non-original holders of COABs of their property in violation of the due process clause of the Fifth Amendment, by discriminating not only between creditors of the same rank but also between creditors of the same class.

(3) In holding that the subordination agreement contained in the COABs, received in exchange for CDCs, is enforceable against non-original holders of COABs but not enforceable against original holders of COABs.

Reasons for Granting the Writ.

I.

The decision of the Circuit Court of Appeals is plainly wrong and, if permitted to stand, will perpetuate a grave injustice to many holders of Ageco securities.

Of $42,089,884 of COABs outstanding, approximately $20,000,000 are Original COABs and the balance, or $22,089,884, are Non-original COABs (R. 62-63, 290, 292). These Non-original COABs are held by "many" holders (Elias R. 255).

The Plan provides for participation by original holders of COABs, received in exchange for CDCs, but denies participation to *transferees* of such original holders. This startling discrimination between creditors of the very same class, the like of which may not be found in any of the myriad of reorganization cases in the Federal reports, is not rested upon the ground that said transferees have been guilty of any fraud or overreaching, or on the ground that their conduct in acquiring their claims "is contrary to established equitable principles". Cf. *Prudence Corp.* v. *Geist,* 316 U. S. 89, 93 (1942). The theory underlying such discrimination (i. e., the *latest* theory of the Circuit Court of Appeals) is that original holders of COABS who received them in exchange for CDCs are granted participation in the Plan because "they may have a claim for rescission or damages based on fraud or misrepresentation in connection with the exchange", which claim for rescission, *under New York Law,* did not pass to any transferee in the absence of a specific assignment thereof (R. 3588).

This rationale is plainly ill-founded for several reasons, *any one of which is sufficient to require reversal of the decision of the court below.*

A. The right of COABs, received in exchange for CDCs, to participate in the Plan on a parity with CDCs and CICs is not founded upon a claim for rescission but upon the express terms of the COABs which place them on a parity with the CDCs and the CICs.

The subordination clause in the COABs provides that they shall be subordinate to all other Ageco indebtedness "except * * * (2) the indebtedness or obligations convertible at the option of the Company into stock of the Company of any class * * *" (Elias R. 171).

The CDCs, which participate in the Plan, are convertible by Ageco into preferred stock (Elias R. 231-233) and the Special Master specifically so found (Elias R. 226). Similarly, the CICs of 1938 (extended to 1943), which also participate in the Plan (R. 289), are convertible by Ageco into stock (Elias R. 192). Since *by their terms* the COABs are not subordinate to, i. e., are on a parity with, CDCs and CICs, there is no possible justification permitting the CDCs and the CICs to participate in the Plan while at the same time excluding the COABs (i. e., more than half of them).

The Circuit Court of Appeals attempted to meet this argument by saying that COABs are "entitled to nothing whatever until all creditors to whom they are subordinated have been paid in full"; that the FIDs (to which admittedly the COABs are subordinated if the subordination clause in the COABs is valid, as we assume for purposes of this petition) "are not being paid in full"; that "all that is received by the unsubordinated convertible obligations comes out of an estate" to which COABs "can have no claim, since creditors to which they are subordinated * * * would exhaust the assets if paid in full"; and "the Non-original COs [COABs] * * * have no right of participation, and what may have been allowed to creditors holding convertible obligations of Ageco is no concern of theirs" (R. 3588-3589).

This, we submit, with all due deference, is judicial "double talk", since it begins with the wholly erroneous assumption that the COABs are subordinate Ageco debt *when admittedly they are on a parity with CDCs and CICs* which *admittedly are not subordinate debt.*

The vice of the decision of the court below lies in the fact that it gives effect to *one part* of the COAB subordination clause (*i.e.*, that part by which the COABs are made

subordinate to debt such as the FIDs, which are not convertible by Ageco into stock) but completely nullifies an equal and coordinate part of that clause (*i.e.*, that part by which the COABs are placed on a parity with CDCs and CICs, which in turn are on a parity with the FIDs!).

Petitioners believe, as contended at the outset, that the entire subordination clause in the COABs should have been held invalid as inconsistent and impossible of application. If, however, such clause is held to be valid, *both parts* of it must be given effect. Obviously, that can be done only by putting the COABs on a parity with the CDCs and the CICs. This may conceivably require, upon a marshalling of assets, dilution of the share of the CDCs and the CICs; but it does not require, and there is no possible justification for requiring, that any of the COABs be treated on any less favorable basis than the CDCs and the CICs, since to do so is completely to nullify the provision in the subordination clause under which the COABs are on a parity with the CDCs and the CICs.

B. The purported conversion of unsubordinated CDCs into subordinated COABs was wholly void for lack of consideration, and accordingly the subordination clause in the COABs is unenforceable, whether in the hands of an original holder or a transferee.

When Ageco, during the years 1931-1934, exchanged the CDCs for COABs (see pp. 6-7, *supra*), it merely substituted one debt claim (unsubordinated) for another debt claim (subordinated, as to a large part of the Ageco debt, if the subordination clause be assumed to be valid), the new debt claim being in the same principal amount, bearing the same rate of interest, but having an extended maturity (Elias R. 230-250). No consideration whatever passed from Ageco to the holder of CDCs in connection with the exchange. Prior to the exchange, a holder of CDCs

was a general unsubordinated creditor of Ageco (Elias R. 235). When he received COABs in exchange for his CDCs, he became, on the theory of the decision of the court below, a junior creditor, who had agreed to subordinate his claim to those of other creditors. For this deterioration in status, the CDC holder received no consideration whatsoever.

The CDCs were by their terms convertible by Ageco, subject to certain conditions precedent, into preferred stock, but they were not convertible into other forms of debt (Elias R. 231-233).

It may be that if, at the time of the exchange, Ageco had a legal right to convert the CDCs into preferred stock and had waived such right, there would have been a consideration for the exchange of unsubordinated CDCs for subordinated COABs. But in the case of the CDCs 1931 Series, Ageco unquestionably had no such right because a condition precedent had not, and could not be, met (Elias R. 244, 247, 263); and in the case of the other CDCs which were exchanged for COABs, the courts below have proceeded on the assumption that Ageco either had no right of conversion or could not legally exercise it (R. 262-264, 3588; Elias R. 281-282).

Since, therefore, there was no consideration for the exchange of CDCs for COABs, it was void and unenforceable. *Brainard* v. *Commissioner of Internal Revenue*, 91 F. (2d) 880, 882 (C. C. A. 7th, 1937); *Arend* v. *Smith*, 151 N. Y. 502 (1897). Being void for want of any valid consideration, the agreement to subordinate was unenforceable not only in the hands of the original holder of the COABs but in the hands of any transferee. That being the case, there was no basis—wholly apart from the argument under sub-point A, *supra*—for the courts below discriminating between Original COABs and Non-original COABs.

Although this contention was made in petitioners' brief in the Circuit Court of Appeals, it was ignored by that court in its opinion.

C. As to holders of COABs which were received in exchange for one issue of CDCs (the 1931 Series), there is no possible basis for distinguishing between Original and Non-original holders, since admittedly the CDCs 1931 Series were not, and could not have been, validly converted.

In his Report in the CDC Litigation the Special Master held that Ageco did not validly convert a portion of the CDCs 1931 Series because a condition precedent to such conversion had not, and could not, be complied with because of time limitations (Elias R. 263). On the basis of this conclusion, which has never been questioned by any party, the Special Master held that *original* holders of COABs received in exchange for said CDCs 1931 Series were unsubordinated general creditors of Ageco (Elias R. 263). This conclusion, approved by the courts below, is clearly with legal basis on any theory.

If, in the case of the CDCs 1931 Series, the conversion option was not validly exercised, the purported exchange thereof for COABs was a nullity. In legal effect, therefore, such COABs never came into being, and the holders thereof still remained holders of CDCs with all the rights of such; and necessarily this would be just as true as to a transferee of an original holder of COABs who received them for CDCs 1931 Series as to an original holder of COABs who received them for CDCs 1931 Series.

The right of *any* holder of COABs who received them in exchange for CDCs 1931 Series is thus not dependent upon a claim of right to rescission because of fraud or misrepresentations, but upon the fact *that the purported conversion never took place.* Since a person who received COABs in exchange for CDCs 1931 Series still remained,

in legal effect, the holder of CDCs, any transferee of such COABs must necessarily stand in the same position. Certainly, in this situation, there is no possible basis for depriving *any* holders of COABs (which were received in exchange for CDCs 1931 Series) of the right to participate in the Plan.

Prior to the alleged act of conversion the share of each holder of CDCs 1931 Series in the estate of AGECO was fixed and could be mathematically ascertained. So was the share of every other security holder (FID) in this fund. If all the holders of COABs which were exchanged for CDCs 1931 Series participate in the funds of the estate, the other security holders are being deprived of nothing. On the other hand, if all the holders of COABs which were exchanged for CDCs 1931 Series do not participate, the share of the other security holders of AGECO are to that extent enlarged and enriched. To discriminate between original holders and non-original holders of these particular COABs would obviously present a wholly unmerited windfall to the other creditors who are allowed to participate in the Plan.

II.

The decision of the Circuit Court of Appeals is in conflict with, and does not give proper effect to, applicable decisions of this Court.

The decision of the court below violates the fundamental principle of equality of distribution in bankruptcy proceedings as enunciated in repeated decisions of this Court.

Section 65(a) of the Bankruptcy Act (11 U. S. C. A. 105(a)) provides that:

> "Dividends of an equal per centum shall be declared and paid on allowed claims except such as have priority or are secured".

In administering this provision of the Bankruptcy Act the basic principle has been equality of treatment for all creditors without any discriminations or preferences except those specifically designated by the statute. *Sampsell* v. *Imperial Paper Corp.*, 313 U. S. 215, 219 (1941); *Young* v. *Higbee Co.*, 324 U. S. 204 (1945); *Boese* v. *King*, 108 U. S. 379, 385-386 (1883); *In re Moore*, 11 F. (2d) 62, 63 (C. C. A. 4th, 1926). As stated by this Court in *Sampsell* v. *Imperial Paper Corp.*, *supra*, at page 219, "The theme of the Bankruptcy Act is equality of distribution". Similarly, in *Young* v. *Higbee Co.*, *supra*, this Court said (324 U. S. at p. 210) that "historically one of the prime purposes of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets".

In violation of this fundamental principle of bankruptcy administration, the Plan in the case at bar discriminates between holders of securities not only of the same rank but of the same class by permitting holders of CDCs, CICs and original holders of COABs to participate in the Plan and by excluding non-original holders of COABs.

It is not asserted that those so excluded from participation in the Plan have been guilty of fraud or any improper conduct, whether in connection with the acquisition of their securities or otherwise; nor is it even suggested that the non-original holders of COABs paid less for them than the original holders of COABs paid for the CDCs which they exchange for their COABs. Indeed, it appears that "many" of the COABs were not issued in exchange for CDCs *but were issued by Ageco for cash* (Elias R. 255). Since all such latter COABs are "Non-original COABs" we have the extraordinary situation *where holders of COABs who acquired them from Ageco for cash, and presumably at or near par, are excluded from the Plan although other holders of COABs who received them in*

exchange for CDCs (which CDCs may have been purchased at a substantial discount in the open market) are allowed to participate!

The record is thus entirely bare of any equitable considerations which justify treating transferee holders of COABs on any different basis than original holders of COABs or holders of CDCs and CICs. Accordingly, in sanctioning a discrimination between original holders of COABs and non-original holders of COABs (a discrimination which was not applied in the Plan to any other Ageco securities, although it is common knowledge that most of the Ageco securities dealt with in the Plan have been sold in great volume in the open market, so that very few of them are in the hands of the original holders) the decision of the court below violates the equality of distribution principle which this Court has repeatedly applied in bankruptcy proceedings.

The only justification advanced for this extraordinary discrimination by the court below (which failed entirely to answer petitioners' contention that by their very terms *all* COABs are entitled to be treated on a parity with CDCs and CICs, and which failed even to mention petitioners' contention that, as a matter of *contract law,* the subordination clause in *all* COABs, exchanged for CDCs, was unenforceable for lack of any consideration) was the highly technical suggestion that Original COABs "may have a claim for rescission or damages based on fraud or misrepresentation in connection with the exchange", and that, *under New York law,* this claim for rescission did not pass to a transferee (R. 3588). In reaching this conclusion, however, the Circuit Court of Appeals applied State law *to a matter which is clearly controlled by Federal law.*

This Court has repeatedly held that the Bankruptcy Act provides its own criteria for the distribution of bank-

rupt estates, and that in the distribution of such estates, Federal law and not State law is controlling. *Prudence Corp.* v. *Geist,* 316 U. S. 89 (1942); *Moore* v. *Bay,* 284 U. S. 4 (1931); *Globe Bank* v. *Martin,* 236 U. S. 288 (1915).

Thus, in *Prudence Corp.* v. *Geist,* 316 U. S. 89, *supra,* this Court held, in a proceeding under Section 77B of the Bankruptcy Act, that an insolvent defaulting guarantor of certificates of participation in a mortgage, who was also the owner of a part of the mortgage indebtedness, was entitled to share *pro rata* in the distribution of the proceeds of the mortgage *notwithstanding a New York rule under which the claim of such a creditor would be subordinated to other creditors.* In holding that the local New York rule should not govern, this Court said (p. 95):

> "* * * Nothing decided in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, requires a court of bankruptcy to apply such a local rule governing the liquidation of insolvent estates. The bankruptcy act prescribes its own criteria for distribution to creditors. In the interpretation and application of federal statutes, federal not local law applies. * * *"

Similarly, in *Globe Bank* v. *Martin,* 236 U. S. 288, *supra,* this Court held that where certain creditors within four months prior to the filing of the petition in bankruptcy had attached property conveyed by the bankrupt in fraud of creditors, such property should be distributed between all the creditors as a general asset of the bankruptcy estate *and not between merely those creditors who would have alone shared in the property under the State law.*

Contrary to the decisions of this Court above cited, the Circuit Court of Appeals in the case at bar determined the question of the right of Non-original COABs to participate in the Plan on the basis of a New York rule of law

under which a right of rescission assumed to have been possessed by an original holder of COABs did not pass to a transferee. If the question of the right of the Non-original COABs to participate in the Plan on a parity with Original COABs had been dealt with on the basis of Federal law, as required by the above-cited decisions of this Court, the court below would have been required to hold that the claims of one group of claimants should not be subordinated to those of other claimants *of the same class* in the entire absence of any suggestion that the conduct of the former group of claimants in acquiring their claims was contrary to "established equitable principles". See, *Prudence Corp.* v. *Geist,* 316 U. S. 89, 93 (1942), *supra.*

Even if the court below had approached the question of the right of the Non-original COABs to participate in the Plan on the basis of a determination, *under Federal law,* whether the assumed right of rescission which was possessed by an original holder of COABs passed to a transferee, petitioners believe that the court below would have been required to reach a conclusion contrary to that which it did reach. In *Remington on Bankruptcy* (4th ed.), §896, p. 407, the applicable rule in bankruptcy is stated as follows:

> "* * * The character of a debt is fixed when it is incurred, and is not changed by an assignment. *Priority as an incident of a debt is attached to the debt and not to the person of the creditor; to the claim and not to the claimant.* * * *"

See also Williston on Contracts (Rev. Ed.), §447a. In accordance with this principle, this Court has held that the priority in bankruptcy which attaches to a claim for wages earned within three months before commencement of proceedings in bankruptcy *passes automatically to an assignee of such claim. Shropshire, Woodliff & Co.* v.

Bush, 204 U. S. 186 (1907); *Union Trust Co.* v. *Walker*, 107 U. S. 596 (1882). As stated in the first case cited (204 U. S. at p. 189), "The priority is attached to the debt and not to the person of the creditor; to the claim and not to the claimant."

Wholly apart from the other reasons for granting certiorari discussed above (pp. 14-22, *supra*), the authorities just above cited sufficiently indicate that the Federal law (as to whether the assumed right of rescission which was possessed by an original holder of COABs passed to a transferee) may be different from the New York law as, in and of itself, to require that this case be remanded to the court below to determine this question under Federal law rather than New York law.

Conclusion.

It is respectfully submitted that the writs of certiorari be granted.

July 18, 1945.

PAUL DURYEA MILLER,
20 Pine Street,
New York 5, N. Y.,

ABRAHAM MITNOVETZ,
29 Broadway,
New York 5, N. Y.,
Attorneys for Petitioners.

MUDGE, STERN, WILLIAMS & TUCKER,
20 Pine Street,
New York 5, N. Y.
of Counsel.

INDEX

	Page
Preliminary statement	1
Opinions below	3
Jurisdiction	3
Questions presented	3
Statute involved	4
Statement	4
Argument	10
Conclusion	18

CITATIONS

Cases:	
Abel v. *Paterno*, 245 App. Div. 285, 281 N. Y. S. 58	12
Associated Gas and Electric Company, 53 F. Supp. 107	8
Bird & Sons Sales Corp. v. *Tobin*, 78 F. 2d 371	17
Case v. *Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106	16
Consolidated Rock Products Co. v. *Du Bois*, 312 U. S. 510	15
Elias, et al., v. *Clarke, et al.*, 323 U. S. 778	4, 9
Elias, et al., v. *Clarke, et al.*, 143 F. 2d 640	8, 12
Group of Institutional Investors v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523	16
Marine Harbor Properties, Inc. v. *Manufacturers Trust Co.*, 317 U. S. 78	16
Pepper v. *Litton*, 308 U. S. 295	15
Sampsell v. *Imperial Paper Corp.*, 313 U. S. 215	15
Smith v. *Continental & Trust Co.*, 292 N. Y. 275, 54 N. E. 2d 823	12
Taylor v. *Standard Gas & Electric Co.*, 306 U. S. 307	15
Statutes:	
Bankruptcy Act:	
Sec. 174	4
Sec. 208	2
Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. Sec. 79a to 79z–6)	2
Miscellaneous:	
Federal Rules of Civil Procedure, Rule 23	11

In the Supreme Court of the United States

OCTOBER TERM 1945

No. 241

IRVING ELIAS, MAX MENACHEN AND MICHAEL MOISE, CONSTITUTING THE PROTECTIVE COMMITTEE FOR THE HOLDERS OF CONVERTIBLE OBLIGATIONS, DUE 2002, ETC., ET AL., PETITIONERS

v.

STANLEY CLARKE, TRUSTEE OF ASSOCIATED GAS AND ELECTRIC COMPANY, DEBTOR, ET AL.

No. 242

IRVING ELIAS, MAX MENACHEN AND MICHAEL MOISE, CONSTITUTING THE PROTECTIVE COMMITTEE FOR THE HOLDERS OF CONVERTIBLE OBLIGATIONS, DUE 2002, ETC., ET AL., PETITIONERS

v.

DENIS J. DRISCOLL AND WILLARD L. THORP, TRUSTEES OF ASSOCIATED GAS AND ELECTRIC CORPORATION, DEBTOR, ET AL.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

664486—45——1

PRELIMINARY STATEMENT

The Securities and Exchange Commission, pursuant to Section 208 of the Bankruptcy Act (Act of June 22, 1938, c. 575, Sec. 1, 52 Stat. 894, 11 U. S. C. Sec. 608) became a party to the present preceeding for the reorganization of Associated Gas and Electric Company (hereinafter referred to as "Ageco") and its subsidiary, Associated Gas and Electric Corporation (hereinafter referred to as "Agecorp") under Chapter X of the Bankruptcy Act in the District Court for the Southern District of New York, and participated in the appeal to the Circuit Court of Appeals.

The Commission is also interested in the present proceedings because the debtors are public utility holding companies registered under the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. Sec. 79a to 79–6) and their transactions are accordingly subject to the Commission's regulation as provided by that Act. Moreover, in fulfillment of its function under Section 11 (f) of that Act the Commission was required to and did pass upon the plan of reorganization which is here involved, and has approved it as fair and equitable, feasible and otherwise in conformity with applicable standards of that Act (Holding Company Act Release No. 4985, R. 3347–3432).

OPINIONS BELOW

The opinion of the District Court (R. 152–277) is reported at 61 F. Supp. 11. The opinion of the Circuit Court of Appeals is reported at 149 F. 2d 996.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered April 19, 1945 (R. 3593–3994). The petition for writs of certiorari was filed July 18, 1945. Jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. In a reorganization of debtors under Chapter X, where the assets are less than the senior debt, is a plan fair and equitable which accords participation to holders of junior debt whose securities evidence a right to rescind the transactions by which they had received such securities in exchange for others which are concededly entitled to participation, but excludes other holders of such junior debt whose securities do not evidence this right?

2. In a reorganization of debtors under Chapter X, where the assets are less than the senior debt, is a plan fair and equitable which grants participation to certain securities which are entitled to rank on a parity with senior debt, but excludes, on principles of marshaling, other securi-

ties which, although equal in rank to the first-mentioned securities, have been determined to be subordinate in rank to the senior debt?

STATUTE INVOLVED

The statute involved is Section 174 of the Bankruptcy Act (52 Stat. 891, 11 U. S. C. Sec. 574), the relevant part of which provides:

> After the hearing, * * * the judge shall enter an order approving the plan or plans which in his opinion comply with the provisions of section 216 of this Act, and which are fair and equitable, and feasible * * *.

STATEMENT

Petitioners are holders of securities of Ageco who are excluded from participation under a joint plan of reorganization of Ageco and Agecorp filed by the trustees of those companies. The plan was evolved after considerable inquiry into the rights of all parties affected by it, and has been approved by the Commission and both courts below. The rights of petitioners were also passed upon in proceedings directly involving the claims of petitioners in which a Special Master, the District Court and the Circuit Court of Appeals classified those claims as subordinate obligations of Ageco. Their petition for certiorari in those proceedings was denied by this Court at the last Term. *Elias, et al.*, v. *Clarke, et al.*, 323 U. S. 778.

The plan undertakes to resolve by settlement numerous controversial legal, equitable and factual issues. These issues were considered at length in two proceedings generally called the "Recap" and "CDC" litigations, the nature of which is briefly indicated below. The plan provides for the termination of these proceedings by an allocation of participations in the joint assets of the two debtor estates which reflects a weighing of the litigation strength of each class of participating claimants. The plan excludes from participation all classes of stock and subordinate debt as such, since the value of the assets is insufficient to pay unsubordinated debt in full, and junior obligations could not participate on any tenable theory consistent with the absolute priority rule applicable in bankruptcy reorganizations.

Both Ageco and Agecorp have outstanding large amounts of debt securities. According to the corporate records Ageco has virtually no assets other than junior securities of Agecorp, and since the publicly-held obligations of Agecorp substantially exceed the value of its assets, there could be little or no realization by any Ageco debt obligations if the recorded rights and priorities were to be followed. The "Recap" litigation was brought by the trustee of Ageco against the trustees of Agecorp to establish a right to secure or share in the assets of Agecorp. (R. 63–64.)

The "CDC" litigation, with which petitioners are primarily concerned, involves claims (including those of petitioners) raised by holders of various convertible and other obligations of Ageco who have sought to establish themselves as unsubordinated general creditors of Ageco.[1] (Elias R. 3–10).[2] The controverted issues related primarily to Ageco's purported conversion, into other classes of securities, of various series of Convertible Debenture Certificates ("CDCs"), Convertible Certificates ("CCs") and Convertible Obligations ("Old COs"). These were interest-bearing securities without fixed maturity date and were by their terms convertible into stock at the option of the company. Elias R. 231, 233, 235.) After the last of these securities had been issued, Ageco, in May 1932 and thereafter, sent notices to the holders of these securities that it was thereby exercising its right of conversion into stock. By the same notices Ageco gave these security holders the option of receiving Ageco Convertible Obligations, Series A and B, due 2002 ("COs") in lieu of the stock. (Elias R. 241–244, 247–250.) The COs, like the CCs and old COs but unlike the CDCs, were by their terms subordinated to un-

[1] None of the creditors of Ageco (like those of Agecorp) has a lien. For the most part they are holders of indentured, but unsecured, debt securities. (R. 62–63, 260, 279, 289, 293.)

[2] By stipulation of the parties, the Transcript of Record heretofore filed in Nos. 590 and 591, October Term 1944, is part of the record herein and is referred to by the notation "Elias R."

subordinated Ageco debt. They were not subordinate, however, to any other Ageco subordinate debt or to debt convertible into stock at the option of the company. (Elias R. 171.) Some holders of CDCs, CCs and Old COs surrendered their certificates in exchange for COs, others made the exchange for stock, and some retained their certificates. Ageco also sold some COs for cash and issued others in exchange for securities of other companies in the Associated system. (Elias R. 876, 883.) The petitioners herein (designated as Non-Original Holders of COs) are holders of COs who did not receive them in exchange for CDCs, but acquired them in the open market, by exchange for other Ageco securities (which, unlike the CDCs, were themselves subordinated securities), by purchase directly from Ageco, or otherwise. (R. 292–293; Elias R. 251, 255, 883.)

The degree to which the claims of petitioners have been examined and reexamined is shown by a brief recital of the proceedings to date. After numerous hearings before a Special Master and the presentation of an enormous amount of evidence in the Recap litigation, representatives of all participating groups expressed a desire for a prompt and fair adjustment of the issues. The trustees of the two estates entered into discussions looking to settlements of the Recap litigation, in the course of which the discussions were broadened to consider issues raised in the "CDC

664486—45——2

litigation." The trustees of Ageco and Agecorp reached substantial agreement between themselves on all the issues and, after their proposals for settlement had been submitted to all representatives of security holders who had theretofore participated in the reorganization proceedings and in the litigations, they held further conferences and modified their initial proposals in various respects. The modified proposals of the trustees (designated for convenience as the "Recap Compromise"), were referred to the Special Master who had heard the Recap and CDC litigations and, again after hearing and argument, he recommended their approval as fair and equitable. (R. 6–101.) Meanwhile the Special Master submitted his report in the CDC litigation (R. 64–5, Elias R. 196–263), finding adversely to the claimants' contentions and recommending classification of holders of certain Ageco securities, including Non-Original Holders of COs, as subordinate Ageco creditors. He expressly left open the question whether a compromise should be reached as to holders of COs who had acquired their securities in exchange for CDCs (Original Holders of COs)[3] and as to holders of CDCs. After hearings on exceptions to the Special Master's report, the District Court adopted his recommendation that Non-Original Holders of COs be classified as

[3] As defined in the plan, Original Holders are those whose securities were originally issued in exchange for CDCs, or their personal representatives, legatees or statutory successors.

holders of subordinate Ageco debt, also leaving open the question of the status of Original Holders. (In the Matter of *Associated Gas and Electric Company,* 53 F. Supp. 107 (S. D. N. Y. 1943).) The classification order of the District Court was affirmed on appeal (*Elias, et al.,* v. *Clarke, et al.,* 143 F. 2d 640 (C. C. A. 2, 1944)) and certiorari was denied by this Court (323 U. S. 778).[4]

The trustees formulated and filed with this Commission for approval under Section 11 (f) of the Public Utility Holding Company Act their plan allocating participation in the combined assets of Ageco and Agecorp in accordance with the formula contained in the Recap Compromise which, as noted, had been recommended for approval by the Special Master. The Commission approved the plan as fair and equitable, feasible and in conformity with all other relevant standards of the Holding Company Act. (R. 3347–3432.) The plan was then submitted to the District Court for consideration under the relevant standards of Chapter X. That court found the plan and the Recap Compromise to be fair and equitable and approved the plan. (R. 152–277.) The District

[4] The Non-Original Holders of COs were represented by a protective committee, called the "Elias Committee", which is a different committee from that representing Original Holders. It is this committee which filed exceptions to the Special Master's report in the CDC litigation, took the ensuing appeals, and filed the petition for certiorari in this Court in the *Elias* case. It also filed the petition herein.

Court's action was affirmed by the Circuit Court of Appeals, whose judgments are the subject of the petition for writs of certiorari.

In all these procedures leading to the development of the plan and its approval by the Commission and the courts below, full and careful consideration was given to the rights asserted by petitioners. The decision to exclude Non-Original Holders of COs was reached and upheld on the basis of a determination that it was clear that they had no valid claim to the status of unsubordinated Ageco creditors. The Recap Compromise and the plan represent an appraisal of the issues which arose out of unique and extensive abuses of corporate forms and intercorporate relationships. In order to avoid protracted and uncertain litigation, compromise participations are accorded by the plan to all classes of claimants whose legal and equitable position is deemed to carry with it any fair possibility of successful establishment of a right to participate. In the case of Non-Original Holders of COs, the appraisals of their legal and equitable position made by the Special Master in the CDC litigation, by the District Court and Circuit Court in the *Elias* case, and by the Trustees, the Commission and the courts below in considering and approving the plan, all reached the conclusion that such holders are not entitled to recognition as holders of claims to an unsubordinated debt status.

ARGUMENT

1. Petitioners' contention that they are entitled to equal participation with Original Holders of COs (who are granted the limited participation of approximately 20% of that given holders of unsubordinated Ageco debt)[5] is based on the unsound premise that because they hold identical instruments they are of equal rank.

As the Commission and the courts below emphasized in their respective opinions, participation is granted Original Holders of COs, not on the strength of their securities, but because they may have individual rights of action for rescission of the exchange in which they accepted COs for CDCs. The certificates held by Original Holders which were issued to them in exchange for their CDCs serve merely as evidence of their ability to establish the facts on which rescission might be founded.[6] The exchange has been at-

[5] The participation accorded Ageco's fixed interest debentures (constituting the most important of Ageco's unsubordinated debt securities), was used in the Recap Compromise and in the plan as the common denominator in fixing the various ratios by which the relative participations of the other classes were established. None of the participating classes will receive the full payment provided by the terms of their securities; Ageco's fixed interest debentures will receive only a fraction of their full claim.

[6] The recognition of the claim to regain status as a CDC is given not only to Original Holders of COs but also to original holders of preferred stock issued in exchange for CDCs in the above-mentioned exchange transactions.

The plan recognizes by this device the possibility of a class suit by Original Holders of COs and of preferred stock under a practice analogous to that provided by Rule 23 of

tacked on a number of grounds, among which are that Ageco lacked power to exercise the conversion option, that the exchange was invalid for lack of consideration, and that the method by which the option was purportedly exercised was improper. (R. 64–65; Elias R. 196–263.) The participation of the Original Holders of COs compromises their right to be reinstated as CDCs, which are granted participation of approximately 40% of that accorded unsubordinated Ageco debt in compromise of the CDCs' litigated claim to status as unsubordinated Ageco debt. The right to rescind, however, is one which enures only to Original Holders of COs.

The court in the *Elias* case held that the right to set aside the CDC–CO exchange did not pass to Non-Original Holders of COs. This conclusion was reached on the basis of New York law, under which the transfer of an obligation does not, without special words of assignment, pass the right to rescind the transaction creating the obligation (*Abel* v. *Paterno,* 245 App. Div. 285, 281 N. Y. S. 58; *Smith* v. *Continental & Trust Co. of N. Y.,* 292 N. Y. 275, 54 N. E. 2d 823). This view was followed by the courts below in approving the plan, and is correct.

Petitioners argue that federal rather than state law governs the question of the right of Non-Original Holders of COs to rescind the CDC–CO

---

the Federal Rules of Civil Procedure to establish the right to rescind.

exchange. This is one of the contentions which this Court refused to consider on petition for certiorari in the *Elias* case, and is without merit. There is not here involved any question concerning rules of general applicability for distribution in insolvency which might be determinable under federal law, but merely the narrow preliminary question of what rights were included in the contract of assignment.

Even assuming, *arguendo,* that federal law applies in the determination of whether transfer of the CO certificates carried with it transfer of a right of action for rescission of the exchange in which they were originally issued, petitioners have not shown that a result different from that reached by the courts below would be arrived at. Their sole argument for such different result is that "equity is equality". However, equality of treatment must be based on equality of right, and such equality does not exist as between petitioners and Original Holders of COs.

Examining the quality of the Non-Original Holder's claim, it is important to note that the individual CO certificates did not reveal whether they were originally issued for CDCs, for cash, or for securities other than CDCs. A right to rescind the CDC-CO exchange could attach only to those COs which were issued in that exchange. Under such circumstances a purchaser of a CO certificate who accepted a general transfer, without any specific assignment of a right to rescind

the CDC-CO exchange transaction and, as far as the record shows, without even making an inquiry as to the circumstances under which the particular certificates being purchased were issued by the company, cannot be credited with having intended to purchase a right to be reinstated as a CDC. On the contrary he must be taken to have purchased and paid for merely a security which by its terms was subordinate Ageco debt. He did not have or acquire the basic equities in favor of Original COs which inhered in the confusing circumstances under which the CDCs were converted, and which were appraised in the Recap Compromise as being entitled to some recognition. To accord the Non-Original Holder participation under the plan as compensation for a right he did not acquire would be to confer a windfall upon him at the expense of creditors having legitimate rights against the limited assets and in violation of basic principles of fairness and equity.

This conclusion applies to all Non-Original Holders of COs, including those representing certain exchanged CDCs, 1931 Series, which petitioners claim were clearly invalidly converted. The invalidity of the conversion of this small group of CDCs has not been adjudicated and the issue has been compromised in the same fashion as the issues relating to the validity of the conversion of the other series of CDCs. The decisions in the *Elias* case as well as the application of

sound equitable principles establish that Non-Original Holders of COs are not entitled to raise any of those issues.

None of these uncertainties, on the other hand, attaches to the Original Holders of COs. In deciding whether Non-Original Holders were entitled to the same treatment as Original Holders (as to whose right to participate no question is raised), inquiry has been made into the realities of the circumstances relating to the rights of all claimants as part of the process of determining whether the plan is fair and equitable to every class of persons affected. This approach is the same as that adopted by Federal courts in other bankruptcy reorganizations. Cf. *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307; *Pepper* v. *Litton*, 308 U. S. 295; *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510; *Sampsell* v. *Imperial Paper Corp.*, 313 U. S. 215.

The plan makes no departure from the principle that priority attaches "to the claim and not to the claimant". In the instant situation the claim granted participation—a claim to rescind an exchange allegedly induced by fraud, misrepresentation or mistake of law—is of a personal nature and can be asserted only by a person misled. The new securities he holds serve only to evidence the fact that he is a person misled and to enable him to make the necessary tender in the rescission, if permitted. The claim is to secure rights in spite of, rather than by virtue of, the

securities. The securities themselves are not entitled to any recognition beyond that required by their terms and, where those terms give only a junior claim to assets which are insufficient to pay senior claims, they can receive no participation in their own right.

2. The securities held by petitioners do not in themselves contain any basis for participation in the debtors' assets. They are by their terms subordinate to all pre-existing debt obligations of Ageco except those expressly subordinated to other Ageco debt and those convertible into stock. The assets of the estates, valued at a maximum of $115,000,000 (R. 296, 3384), are substantially less than the aggregate of admittedly unsubordinated obligations of Ageco (approximately $67,000,000 in principal amount) plus the debt obligations of Agecorp which would be entitled to participation under any of the outcomes which might be reached in the event of a final adjudication of the Recap litigation (approximately $189,000,000 in principal amount). As subordinated Ageco debt, COs are not entitled to participation under the absolute priorities rule as enunciated and applied by this Court. *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523; *Marine Harbor Properties, Inc.* v. *Manufacturers Trust Co.*, 317 U. S. 78; *Case* v. *Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106.

The petitioners are not aided by the fact that

CDCs and one of the classes of Ageco's unsubordinated debt obligations (Convertible Investment Certificates ("CICs")), which are given participation under the plan, are by their terms convertible into Ageco stock at the company's option. Assuming, as the petitioners assert, that by virtue of such convertibility the terms of the subordination provision in the CO certificate gave the COs parity with the CDCs and CICs, the COs are nevertheless by their terms subordinate to Ageco debt which is not to receive payment in full, and would not receive payment in full, even if no participation were granted to the CDCs and to the CICs, of which only slightly over $1,000,000 in principal amount are outstanding. On established principles of marshalling of assets (*Bird & Sons Sales Corporation* v. *Tobin,* 78 F. 2d 371 (C. C. A. 8, 1935), followed by the court in the *Elias* case (Elias R. 336), the right of the petitioners to participate equally with the CICs and CDCs would be exhausted by the necessity of applying their participation toward the satisfaction of unsubordinated debt other than the CICs and CDCs, thus leaving petitioners with no final realization.

3. It is our view, for the reasons which have been set forth, that the decisions below were clearly correct and do not present any questions which should be reviewed by this Court. No fundamental or recurrent problem of reorganization law is involved, the issue being limited to

a determination of whether under the particular circumstances of these unprecedented inter- and intra-corporate disputes the fair and equitable standard was satisfied by the exclusion of petitioners. The fundamental determination that petitioners are subordinate creditors has been reached by two tribunals and has been denied review by this Court. No important question of reorganization law is presented by the circumstance that participation is accorded to a class of persons on the basis of their claim for rescission of transactions by which they obtain securities which they now hold but which of themselves are not entitled to participation. For these reasons we believe the petition for writs of certiorari should be denied.

CONCLUSION

The decision of the court below is sound and does not warrant review by this Court.

Respectfully submitted.

HAROLD JUDSON,
Acting Solicitor General.

ROGER S. FOSTER,
Solicitor,
MORTON E. YOHALEM,
Counsel, Public Utilities Division,
LEONARD HELFENSTEIN,
Attorney,
Securities and Exchange Commission.

SEPTEMBER 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945